BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DALE W. MCCORD	)	
Claimant	)	
V.	)	
	)	
WATCO, INC.	)	Docket No. 1,059,565
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO, and	)	
TRAVELERS INDEMNITY CO. OF AMERICA	)	
Insurance Carriers	)	

ORDER

Claimant requested review of Administrative Law Judge Bruce Moore's April 22, 2013 Award. The Award concluded claimant provided untimely notice for a November 16, 2011 date of injury by repetitive trauma.

The Board heard oral argument on October 15, 2013. Randy S. Stalcup, of Andover, Kansas, appeared for claimant. Meredith Moser, of Overland Park, Kansas, appeared for respondent and its insurance carrier, Zurich American Insurance Company (Zurich). Dallas Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier, Travelers Indemnity Company of America (Travelers).

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award.

ISSUES

This case concerns the compensability of a scheduled injury to claimant's right upper extremity. Claimant contends his repetitive injury began before amendments to the Kansas Workers Compensation Act went into effect on May 15, 2011, such that pre-May 15, 2011 law applies. He alleges a statutory date of accident of February 2, 2012 based on faxing a demand letter to respondent on February 2, 2012. As such, notice would be timely. Alternatively, claimant alleges a December 22, 2010 date of accident, when a nerve conduction test was read as showing that he had carpal and cubital tunnel syndromes. He also contends he provided verbal notice to his supervisor on many occasions. Finally, claimant argues it is unconstitutional to apply the new law to an injury that occurred while the old law was pending.

Claimant also raised determination of his average weekly wage, the nature and extent of his disability, whether respondent should pay his unpaid medical bills and whether applying the new law to an injury that began during the old law is unconstitutional.

Respondent argues claimant's date of injury by repetitive trauma is his last day worked, November 16, 2011, and the Award should be affirmed.

The issues for the Board's review are:

- What is the date of claimant's accident or injury by repetitive trauma?
- Did claimant provide timely notice?

FINDINGS OF FACT

Claimant worked for respondent as a "car man" or air brakeman from February 1, 1989 to November 17, 2011. His job consisted primarily of maintaining and repairing brakes on rail cars, but he also performed other repairs as needed. His job required constant use of his hands while working with tools.

During the winter of 2010-11, claimant began experiencing numbness, tingling and weakness in his right hand. He would drop tools. He had an upper extremity nerve conduction study on December 22, 2010. Claimant testified he discussed the problems he was having with his right upper extremity a "dozen" or "half a dozen" times with his supervisor, Kenny Rowell, in early-2011.[1] In these discussions, claimant did not ask for medical treatment or to fill out an accident report. He had prior accidents while working for respondent and knew how to request and fill out an accident report, but he did not do so because he did not think he had an accident. His understanding of an accident was if you "fall or somebody hits you."[2]

Claimant initially thought his symptoms were related to his neck because he had similar upper extremity symptoms that resulted in neck surgeries in 1993 and 2009. However, claimant testified that he told Mr. Rowell that his right hand problems were due to repetitive work activities, specifically not having tools long enough to get leverage.

Mr. Rowell was responsible for reporting accidents. He would see claimant every day at work. While he received training in filling out accident reports and the procedures involved, he acknowledged he received no training on injuries that occur over a stretch of time, such as carpal tunnel syndrome, or how to watch for those types of occurrences.

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[1] See Claimant Depo. at 48-49, 51; see also R.H. Trans. at 20, 22.

[2] Claimant Depo. at 52.

Mr. Rowell denied that claimant ever described upper extremities problems or reported work-related injury to his upper extremities. Mr. Rowell noted claimant never asked to be seen by a company doctor for his upper extremities. He was aware claimant had a condition in his neck that was causing problems because he had approved claimant's time off for medical appointments and surgery. He testified if claimant had told him he injured his right upper extremity as a result of his work, he would have filled out an accident report and sent him for medical treatment.

Respondent's workers compensation insurance coverage changed from Zurich to Travelers on August 11, 2011.

Claimant testified that from Labor Day through October 2011, he took FMLA leave for mental health issues, including panic attacks. His mental health issues were unrelated to his upper extremity complaints and work duties. He returned to regular work on October 29, 2011.

Claimant periodically underwent random drug screenings. On November 16, 2011, claimant was asked to submit to a drug screening by Wade Lunt, respondent's quality assurance manager. Claimant accompanied Mr. Lunt to the clinic, but before a urine sample could be taken, he suffered what he termed a "panic attack." He took Lorazepam for anxiety, but left it at the plant. As a result, he chose not to submit to testing and was picked up by his wife. The following day, respondent terminated claimant's employment for refusing to submit to testing.

Prior to claimant's termination, he had not been taken off work or provided any work restrictions as a result of his right arm symptoms.

After losing his job, claimant sought treatment on his own for his right upper extremity and was referred to K. Sunil Menon, M.D. On December 16, 2011, Dr. Menon referred claimant for nerve conduction testing. Such test was performed on January 12, 2012. Claimant testified he learned after the testing that he had carpal tunnel syndrome.

On February 2, 2012, Dr. Menon performed a right carpal tunnel release and right ulnar nerve release. Charges for this surgery were initially submitted under claimant's private health insurance. Claimant did not make a claim for workers compensation benefits until after he underwent surgery. The parties agreed at oral argument that claimant's attorney faxed a demand letter to respondent on February 2, 2012. Respondent also received such letter by certified mail on February 3, 2012.

On February 10, 2012, claimant filed an application for hearing alleging the date of accident as "repetitive from January 2011 through November 17, 2011."

On June 29, 2012, claimant, at the request of his attorney, was evaluated by Daniel Zimmerman, M.D., a board certified independent medical examiner. Claimant gave a history that he "developed pain and discomfort affecting the right upper extremity due to repetitive trauma through January of 2011 in carrying out work duties at Watco." Dr. Zimmerman opined claimant's repetitive work duties for respondent were the prevailing factor in causing claimant's right carpal tunnel syndrome and right ulnar nerve entrapment. Dr. Zimmerman provided claimant a 53% impairment to the right upper extremity at the wrist level based upon the AMA *Guides*[3] (hereafter *Guides*).

On September 14, 2012, claimant was seen at the request of respondent by John Estivo, D.O., a board certified orthopedic surgeon. Claimant gave Dr. Estivo a history that he began experiencing right upper extremity pain and numbness on November 17, 2011. Dr. Estivo opined that claimant's work activity for respondent was the prevailing factor in causing his carpal tunnel syndrome and right ulnar nerve entrapment at the wrist. Dr. Estivo rated claimant as having a 19% impairment to the right upper extremity pursuant to the *Guides*.

PRINCIPLES OF LAW

Under both the old law and new law, claimant has the burden to prove his or her right to compensation.[4] The workers compensation laws in effect at the time of an accident govern the parties' rights.[5] The old law and new law substantially differ concerning date of accident or date of injury by repetitive trauma and notice.

Old Law (Pre-May 15, 2011)

K.S.A. 2010 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] K.S.A. 2010 Supp. 44-501(a); K.S.A. 2010 Supp. 44-508(g); K.S.A. 2011 Supp. 44-501b©; and K.S.A. 2011 Supp. 44-508(h).

[5] K.S.A. 44-505(c) (Furse 2000).

not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 44-520 (Furse 1993) states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

New Law (May 15, 2011 Forward)

K.S.A. 2011 Supp. 44-508 states in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

K.S.A. 2011 Supp. 44-520 states in part:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(c) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; . . . .

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

The date of accident due to a series of events, repetitive use, cumulative traumas or microtraumas (as described in the old act) or injury by repetitive trauma (as defined in the new act) is a legal fiction[6] and is determined by statute.[7]

Claimant contends his repetitive injury began December 22, 2010 and commenced through his last day worked, November 16, 2011. He asserts the amendments to the Kansas Workers Compensation Act that went into effect on May 15, 2011, do not apply because his injury started before the statutory change. He alleges a statutory date of accident of February 2, 2012 based on his attorney faxing a demand letter to respondent that very day. Alternatively, claimant alleges a December 22, 2010 date of accident, when a nerve conduction test scientifically established that his right arm was injured. He also contends he provided verbal notice to his supervisor on many occasions.

While claimant argues for an accident date that occurred prior to the change in law, application of K.S.A. 2010 Supp. 44-508(e) does not compel such result.

Prior to the change in the law, claimant was not taken off work by an authorized physician or restricted from performing the work which is the cause of the condition, so these factors do not assign an accident date under the old law. Written notice to the employer of the injury occurred on February 2, 2012, after the change in the law. The condition was diagnosed as work related and communicated in writing to the injured worker only after Dr. Zimmerman's June 29, 2012 report was issued, also well after the 2011 amendments. Therefore, as indicated in the Award, "There are thus no statutory 'triggers' to establish a date of accident prior to May 15, 2011."[8]

Claimant argues the old law applies because the date of accident occurred on December 22, 2010, the date of a nerve conduction study. Such premise is incorrect for a couple reasons. First, the December 22, 2010 nerve conduction study is not in evidence. Second, even it was in evidence, the nerve conduction study, by itself, is legally irrelevant to determining the date of accident or injury by repetitive trauma in this case. The nerve conduction test did not affix an accident date under the old law because:

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[6] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 615, 256 P.3d 828 (2011) ("[D]esignation of an accident date in a repetitive use case is not a factual determination of the precise moment at which the claimant suffered the personal injury. . . . [A]ssignment of any single date as the "accident date" for a repetitive use/cumulative traumas injury is inherently artificial and represents a legal question, rather than a factual determination."); see also *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

[7] K.S.A. 2010 Supp. 44-508(d) and K.S.A. 2011 Supp. 44-508(e).

[8] ALJ Award at 9.

- it did not cause a physician to take claimant off work or provide restrictions;
- the nerve conduction study was not given by claimant to respondent as written notice of the injury; and
- the nerve conduction study did not diagnose a condition as work related and no work-related diagnosis was communicated in writing to claimant.

Claimant also argues that the old law applies because his injury started or commenced before the change in the law.[9] However, our statutes affixing date of accident or injury by repetitive trauma are not based on when a physical problem first manifests.

Claimant's date of injury by repetitive trauma was his last day worked, November 16, 2011, as based on the new law. Claimant concedes that "[a]pplication of the new law results in denial of benefits."[10] This is a new law case. Claimant's case fails based on lack of timely notice. At the earliest, claimant gave respondent notice of his injury by repetitive trauma in a letter faxed by his attorney on February 2, 2012.[11] Notice on February 2, 2012 was not provided within 20 days. As such, these proceedings are not maintainable.

The Board agrees with Judge Moore that claimant did not provide notice of his injury by repetitive trauma in the winter of 2010-11 when discussing his symptoms with Mr. Rowell. As indicated in the Award, "It is abundantly clear that Claimant's alleged conversations with Mr. Rowell did not provide notice of 'the time, date, place, person injured and particulars of' an injury occurring on November 1[6], 2011. Nor can the alleged conversations be interpreted to make it 'apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.'"[12]

The issue of notice is dispositive; all other issues are moot. The Board lacks authority to address claimant's constitutional argument.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board affirms the Award.

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[9] Claimant's Appeal Brief (filed May 30, 2013) at 8.

[10] *Id.* at 7.

[11] The Board notes that this February 2, 2012 letter indicates that repetitive injury occurred from January 2011 through November 17, 2011, but does not state what body part was injured.

[12] ALJ Award at 10.

AWARD

WHEREFORE, the Board affirms the Award.

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Randy S. Stalcup
stalcuplaw@hotmail.com

Meredith Moser
meredith.moser@zurichna.com

Dallas Rakestraw
drakestraw@McDonaldTinker.com

Honorable Bruce E. Moore